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No. 90-1386

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ELI TARBELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the St. Regis Mohawk Indian Reservation in New York is "Indian country" within the meaning of 15 U.S.C. 1175, which prohibits the possession or use of gambling devices in Indian country and other areas subject to federal jurisdiction.

2. Whether 25 U.S.C. 232, which authorizes the State of New York to exercise criminal jursdiction over offenses committed on Indian reservations in the State, rendered 15 U.S.C. 1175 and 18 U.S.C. 1955 inapplicable to petitioners' gambling operations on the St. Regis Reservation.

3. Whether prosecutions for violations of 15 U.S.C. 1175 and 18 U.S.C. 1955 committed on an Indian reservation are precluded by the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. 1166-1168 and 25 U.S.C. 2701-2720.

4. Whether the gambling businesses of petitioners Laughing and Burns violated 18 U.S.C. 1955.

5. Whether petitioner Laughing was properly denied a downward adjustment of his sentence for acceptance of responsibility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 922 F.2d 1026, and the opinion of the district court (Pet. App. 1b-32b) is reported at 725 F. Supp. 116.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1991. The petition for a writ of certiorari was filed on March 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners entered conditional pleas of guilty to unlawfully using and possessing gambling devices (slot machines) in Indian country, in violation of 15

U.S.C. 1175. Petitioners Laughing and Burns also entered conditional pleas of guilty to conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Laughing was sentenced to concurrent terms of 24 months' imprisonment under 15 U.S.C. 1175 and 27 months' imprisonment under 18 U.S.C. 1955, to be followed by concurrent terms of supervised release, the longest of which is three years. Burns was sentenced to concurrent terms of 21 months' imprisonment, to be followed by concurrent three-year terms of supervised release. Petitioner Tarbell was sentenced to 18 months' imprisonment. Fines and assessments were also imposed against all three petitioners.[1] The court of appeals affirmed their convictions. Pet. App. 1a-28a.

1. Petitioners are three of 13 individuals against whom indictments were returned for illegally operating privately owned casinos on the St. Regis Mohawk Indian Reservation in the Northern District of New York. Eight of the cases were consolidated for the resolution of motions to dismiss the indictments. Following the denial of those motions, Pet. App. 1b-32b, petitioners entered conditional pleas of guilty.[2]

2. The court of appeals rejected petitioners' various challenges to the application of the federal criminal statutes under which they were convicted. First,

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[1] In addition, Laughing pleaded guilty to forcibly interfering with officers executing an arrest warrant, in violation of 18 U.S.C. 111(a), and Burns pleaded guilty to forcibly resisting the execution of a search warrant with a deadly weapon, in violation of 18 U.S.C. 2231(b). Laughing received a concurrent term of ten months' imprisonment and Burns received a concurrent term of three months' imprisonment on those counts.

[2] Only co-defendant Cook (who did not plead guilty, but instead proceeded to trial) joined petitioners in appealing his conviction. Cook has not petitioned for review in this Court.

it held that the St. Regis Mohawk Reservation is "Indian country" within the meaning of 18 U.S.C. 1151, and therefore within the meaning of 15 U.S.C. 1175, which prohibits the possession and use of "gambling devices" in the District of Columbia, in any possession of the United States, within Indian country as defined in 18 U.S.C. 1151, or within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. 7. The court of appeals found it unnecessary to decide whether the St. Regis Mohawk Reservation satisfies the first branch of the definition of "Indian country" in 18 U.S.C. 1151(a), which includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," because it held that the St. Regis Tribe constitutes a "dependent Indian community" under the second branch of the definition of "Indian country" in 18 U.S.C. 1151(b). Pet. App. 7a-13a. The court pointed out that the Tribe's Reservation was established pursuant to a 1796 Treaty (7 Stat. 55), that the Tribe is federally recognized and is identified in governing regulations as having a "special relationship" with the United States (see 51 Fed. Reg. 25,115 (1986)), and that the Bureau of Indian Affairs (BIA) provides the Tribe with funds for education, housing and training programs, social services, roads, and the administration of the tribal government, and is charged with maintaining the integrity of the land and resources. Pet. App. 8a-9a.

The court of appeals next rejected petitioners' contention that neither 15 U.S.C. 1175 nor 18 U.S.C. 1955 could be applied to them because Congress ceded exclusive jurisdiction over the St. Regis Reservation to New York when it enacted 25 U.S.C. 232 in 1948. Pet. App. 10a-12a. Section 232 provides that "[t]he State of New York shall have jurisdiction over of-

fenses committed by or against Indians on Indian reservations within the State of New York." In the court's view, the "plain language" of 25 U.S.C. 232 indicates that it only "extended concurrent jurisdiction to the State of New York." Pet. App. 12a.

The court of appeals likewise rejected petitioners' contention that the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, and IGRA's special criminal prohibition (18 U.S.C. 1166) "preempted" the application of 15 U.S.C. 1175 and 18 U.S.C. 1955 to their conduct. The court explained that the question is not whether the latter statutory provisions were "preempted," but instead whether they were impliedly *repealed* by IGRA —a result that will be found only if there is a "positive repugnancy" between the earlier and later statutes. Pet. App. 13a (quoting *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979)). The Court found no such implied repeal here. It noted that IGRA, in 25 U.S.C. 2710(d)(6), "expressly provides for the continuing application of 15 U.S.C. § 1175" (except where gaming is conducted in accordance with a tribal-state compact, which was not the case here), Pet. App. 17a, and that IGRA and 18 U.S.C. 1955 "do not demonstrate the mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal," especially since Section 1955, unlike IGRA, targets large-scale gambling activities. Pet. App. 16a.

Petitioners Laughing and Burns argued that their gambling operations did not violate 18 U.S.C. 1955 because, although they were conducted in violation of "regulatory" laws of New York, they did not contravene any "prohibitory" laws of the State. The court of appeals noted that the prohibitory/regulatory distinction "was created to protect Indian sovereignty from interference by those states" upon which Con-

gress had granted "general criminal and civil (but not regulatory) jurisdiction" pursuant to Public Law 280.[3] Pet. App. 17a-18a. Here, however, the court concluded that New York laws barring slot machines were "prohibitory," because "New York flatly prohibits the operation of slot machines for gambling purposes." *Id.* at 18a.

Finally, the court held that petitioner Laughing had not been improperly denied a reduction in his sentence for acceptance of responsibility. The court concluded that there was an "adequate foundation" for the district court's factual determination that Laughing had not manifested such acceptance, especially in light of his statement at sentencing that "I will go to my grave saying I did nothing wrong." Pet. App. 23a.[4]

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[3] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321-1326, and 28 U.S.C. 1360.

[4] The court of appeals also rejected petitioners' contention that their conduct was protected by a special one-year grandfather provision in IGRA (25 U.S.C. 2703(7)(D)), Pet. App. 19a-20a, and co-defendant Cook's contention that there was insufficient evidence that he operated slot machines, *id.* at 20a-23a. Those issues are not presented in this Court.

District Judge Lasker, sitting by designation, dissented from the court's rulings that the St. Regis Mohawk Tribe is a "dependent Indian community" and that the district court had properly declined to reduce Laughing's sentence. Pet. App. 24a-28a.

ARGUMENT

1. Petitioners' contention (Pet. 12-14) that the St. Regis Reservation does not satisfy the definition of "Indian country" in 18 U.S.C. 1151, and that 15 U.S.C. 1175 therefore is inapplicable, was properly rejected by both courts below. Pet. App. 7a-10a, 27b-30b. The evidence adduced in the trial of co-defendant Cook (the only defendant to press in the court of appeals the issue of the historical status of the Reservation as Indian country[5]) showed—and petitioners concede (Pet. 12)—that the Reservation was created by the Treaty of May 31, 1796, 7 Stat. 55, and that the St. Regis Tribe is a federally recognized tribe and the beneficiary of federal services by virtue of that special relationship. Pet. App. 8a-9a. Accordingly, the court of appeals was entirely justified in holding that the lands occupied by the St. Regis Tribe constitute a "dependent Indian community" within the meaning of 18 U.S.C. 1151(b), and that the reservation therefore constitutes "Indian country" on that basis.

Contrary to petitioners' contention (which is based on dictionary definitions of the word "dependent," see Pet. 13), the concept of a "dependent Indian community" in 18 U.S.C. 1151(b) does not require that the community be one that "lacks the necessary means of support and receives aid from others"—although the evidence on which the courts below relied

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[5] In the court below, petitioners' briefs asserted only that the Reservation had lost its character as Indian country upon enactment in 1948 of 25 U.S.C. 232, which they contended conferred exclusive criminal jurisdiction on the State. See Pet. C.A. Br. 12, 16, 21; Reply Br. 4-5. The court of appeals therefore was justified in concluding that only Cook claimed that the Reservation had never been Indian country within the meaning of 18 U.S.C. 1151.

fully satisfies that standard. The statutory definition instead is derived from *United States* v. *Sandoval*, 231 U.S. 28 (1913). See 18 U.S.C. 1151, Reviser's Note. The dependency to which Section 1151(b) refers is the status resulting from the subordination of once independent and sovereign nations to the United States, and the concomitant obligation of the United States to afford those nations protection. 231 U.S. at 46; see also *United States* v. *McGowan*, 302 U.S. 535, 538 (1938).

In addition, as the district court held, Pet. App. 27b-30b, the St. Regis Reservation also satisfies the definition of "Indian country" in 18 U.S.C. 1151(a), because it is a "reservation under the jurisdiction of the United States Government." The Treaty of 1796 was entered into between the affected tribes and the United States, although representatives of New York State were permitted to participate. The State could not act alone because under the Constitution and the Indian Nonintercourse Acts, the States were not free to negotiate with Indian tribes concerning tribal lands, and any conveyance of Indian lands made without federal approval was void. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668 n.4 (1974) (*Oneida I*); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 231-232 (1985). The St. Regis Reservation therefore was created not by the unilateral act of the State of New York, but by a federal Treaty whose integrity is protected by federal law.[6]

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[6] Petitioners cite (Pet. 13) a 1952 House committee report for the proposition that there was a "serious question" in Congress as to whether reservations in New York were ever Indian country. However, the report points out that the decisions that might have created doubt were rendered prior to

The result would be no different, however, even if the 1796 Treaty had been solely between the Tribe and New York. The Tribe would still be entitled to federal protection of its occupancy, because such protection is not dependent "upon a treaty, statute, or other formal government action." *Oneida I*, 414 U.S. at 669, quoting *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941).

Petitioners' argument that the St. Regis Reservation is not Indian country is also inconsistent with their reliance on 25 U.S.C. 232, which authorizes New York to exercise jurisdiction over criminal offenses on "Indian reservations" in the State and which petitioners elsewhere contend (Pet. 6-11) granted exclusive jurisdiction to the State. Petitioners' view that Section 232 conferred exclusive jurisdiction (like the court of appeals' view that it conferred concurrent jurisdiction) presupposes that the United States had criminal jurisdiction over the St. Regis and other New York reservations prior to 1948.[7] The touch-

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the codification of the definition of Indian country in 18 U.S.C. 1151 and the enactment of 25 U.S.C. 232 in 1948. H.R. Rep. No. 2337, 82d Cong., 2d Sess. 4 (1952). The clear implication of the report is that the New York reservations in fact are Indian country.

Petitioners also assert (Pet. 13) that a committee report on the Indian Crimes Act of 1976, Pub. L. No. 94-297, 90 Stat. 585, indicated that "New York is a recognized exception to Indian country." In fact, the committee report they cite states that New York is among the States that have been granted criminal jurisdiction over the Indian country within their borders. See H.R. Rep. No. 1038, 94th Cong., 2d Sess. 3 (1976).

[7] Indeed, the exclusivity of federal jurisdiction over New York reservations created by federal Treaties was recognized by this Court and the court of appeals in cases decided prior to enactment of 25 U.S.C. 232. *The New York Indians*, 72

stone of such federal jurisdiction was the status of the land as "Indian country." Moreover, even if petitioners were correct that the United States divested itself of general criminal jurisdiction over the St. Regis Reservation upon enactment of Section 232 in 1948 (but see pages 9-13, *infra*), the Reservation would still retain its status as "Indian country," just as reservations in Public Law 280 States remain "Indian country." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).[8]

In any event, because petitioners' contention that the St. Regis Reservation is not "Indian country" depends upon the unique historical origins of that Reservation, the issue is not one of general importance warranting review by this Court.

2. Petitioners' contention (Pet. 6-11) that 25 U.S.C. 232 conferred exclusive criminal jurisdiction on the State of New York—and that 15 U.S.C. 1175 and 18 U.S.C. 1955 were therefore inapplicable to their conduct—is without merit.

a. Nothing in 25 U.S.C. 232 repeals or creates an exception even to 18 U.S.C. 1152 and 1153, which provide for general federal jurisdiction over crimes by or against Indians in Indian country. By contrast, Pub-

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U.S. (5 Wall.) 761 (1867); *United States* v. *Forness*, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942).

[8] On the other hand, if the St. Regis Reservation is *not* Indian country, the Tribe would not be shielded even from the direct application of state regulatory legislation under the decisions of this Court in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. at 208-210, and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). In that event, the argument by petitioners Laughing and Burns (Pet. 18-22) that they were erroneously convicted under 18 U.S.C. 1955 (the applicability of which is not limited to Indian country) because the state laws they violated were "regulatory" in nature would be entirely unavailing.

lic Law 280 expressly provides that in those States that automatically acquired jurisdiction under that Act, 18 U.S.C. 1152 and 1153 are inapplicable. See 18 U.S.C. 1162(c). Congress thus has demonstrated that when it intends to divest the United States of criminal jurisdicton at the same time it permits a State to exercise such jurisdiction in Indian country, it knows how to do so. There accordingly is no basis for construing 25 U.S.C. 232 to divest the United States of criminal jursdiction, since Congress did not expressly so provide in that Section.

The court of appeals' conclusion that Section 232 confers only concurrent jurisdiction also is in accord with the discussion of the subject by the House committee considering H.R. 6036, 82d Cong., 2d Sess. (1952), an omnibus Indian jurisdiction bill that was the forerunner of Public Law 280. Responding to the question whether jurisdiction previously conferred upon New York and California could be "reacquired" without the consent of the States, the Committee expressed the "considered opinion" that

> Congress has always retained jurisdiction over these crimes even though it has not expressly provided for such retention in the earlier legislation. The mere fact that the acts with respect to New York and California are silent on the subject of concurrent jurisdiction does not deprive the United States of that jurisdiction.

H.R. Rep. No. 2337, 82d Cong., 2d Sess. 2-3 (1952). Observing that "[r]epeal of criminal laws by implication of course is not lightly presumed," the Committee found no evidence that Congress intended a repeal; to the contrary, it expressed the view that there would have been no "compelling need" to repeal the federal laws when it authorized the States to

exercise jurisdiction. The "complete silence" on the question should not be interpreted as an implied repeal. *Id.* at 3.

Contrary to petitioners' assertion (Pet. 10), the decision below does not conflict with any holdings by other courts on the issue, as both courts below correctly noted. Pet. App. 12a, 11b-12b. For example, *People* v. *Edwards*, 78 A.D.2d 582, 432 N.Y.S. 2d 567 (4th Dept. 1980), aff'd, 64 N.Y.2d 658, 474 N.E. 2d 612, 485 N.Y.S. 2d 252 (1984), held that 25 U.S.C. 232 permitted New York to exercise jurisdiction over major crimes committed by Indians on reservations in New York. The court rejected the defendant's contention that the United States had retained exclusive jurisdiction over crimes enumerated in 18 U.S.C. 1153, but the court had no occasion to decide—and did not decide—whether the State's jurisdiction was exclusive. The statements in other opinions cited by petitioners (Pet. 10), which characterize Section 232 as having "surrendered" or "ceded" jurisdiction to New York, were dicta and did not address the question presented here.

b. In any event, the full scope of any displacement of federal law wrought by 25 U.S.C. 232 need not be examined in this case. Even if 25 U.S.C. 232 were construed as if it contained a provision like 18 U.S.C. 1162(c), which renders inapplicable the general criminal jurisdiction of the United States under 18 U.S.C. 1152 and 1153, it would not affect jurisdiction over violations of 15 U.S.C. 1175. That provision, unlike 18 U.S.C. 1152 and 1153, is not part of the general jurisdictional regime applicable to Indian country alone. Section 1175 applies not only to Indian reservations, but also to other enclaves over which the federal government has exclusive or concurrent jurisdiction, and it is intended to reinforce in federal law the policies of those States that outlaw slot machines and

other gambling devices. See H.R. Rep. No. 2769, 81st Cong., 2d Sess. 2 (1950).[9] To construe 25 U.S.C. 232 as petitioners urge would undercut that purpose and could create unauthorized havens for such devices on New York Indian reservations.

Because 15 U.S.C. 1175 remains applicable to Indian reservations even in those States that (by virtue of 18 U.S.C. 1162(c)) were expressly granted exclusive jurisdiction over criminal offenses on Indian reservations as a general matter, Section 232, which contains no express divestiture of federal jurisdiction at all, should not be construed to render 15 U.S.C. 1175 inapplicable to Indian reservations in New York. That is especially so in light of the more recently enacted IGRA, which unequivocally provides that 15 U.S.C. 1175 shall apply to gambling devices on the lands of a federally recognized tribe (unless there is in effect a valid tribal-state compact). 25 U.S.C. 2710(d)(6).

c. To the extent petitioners contend that 25 U.S.C. 232 also precludes the application of 18 U.S.C. 1955 to their casino operations on the Reservation, that contention is frivolous. Even if we assume, *arguendo*, that 25 U.S.C. 232 altogether eliminated any basis for the exercise of federal "Indian country" jurisdiction in New York, 18 U.S.C. 1955 would apply on the St. Regis Reservation in the same manner that it does throughout the State. The application of Section 1955 on an Indian reservation does not rest on Congress's power over Indian affairs; as elsewhere, it rests on Congress's plenary power over commerce.

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[9] Sections 1152 and 1153, by contrast, have as their sole objective the provision of law enforcement services for Indian communities, services which, by hypothesis, can be performed equally well by a State where Congress grants the necessary consent, as it did in Public Law 280.

3. Petitioners further contend (Pet. 14-18) that IGRA "preempts" application of both 15 U.S.C. 1175 and 18 U.S.C. 1955 to their conduct. The court of appeals properly rejected that contention, which it recognized as asserting the implied repeal of the latter two statutes. Pet. App. 13a-17a.

With respect to 15 U.S.C. 1175, the court correctly observed that IGRA, in 25 U.S.C. 2710(d)(6), "expressly provides for the continuing application of 15 U.S.C. § 1175, except where gaming is conducted in accordance with a tribal-state compact that is in effect." It also noted that "no compact ha[d] been agreed to and there ha[d] been no official approval of the compact" affecting the St. Regis Reservation at the time of petitioners' offenses. Pet. App. 17a.

Similarly, the court of appeals correctly found that although 18 U.S.C. 1955 and IGRA might address the same conduct in certain circumstances, they "do not demonstrate the mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal," Pet. App. 16a, at least in the context of this case. See generally *id.* at 13a-16a. The purpose of IGRA is to provide a regulatory framework to govern tribal gaming on Indian lands in order to promote tribal economic development and self-sufficiency, in addition to protecting such gaming operations from the influence of organized crime. See 25 U.S.C. 2702 (1) and (2). This case, however, involves gambling conducted by the individual petitioners, not the Tribe itself. By contrast, the purpose of 18 U.S.C. 1955 is the suppression of large-scale gambling businesses that violate state law, whether or not they are conducted on Indian lands. To hold that IGRA repealed the generally applicable prohibitions in 18 U.S.C. 1955—at least as applied to the non-tribal gambling at issue here—would impute to Congress the illogical

intention to reduce the penalties for carrying on certain large-scale illegal gambling operations on Indian reservations, from the felony penalties provided by 18 U.S.C. 1955 to the misdemeanor penalties provided by assimilated state law. Pet. App. 16a.

4. Petitioners Laughing and Burns contend (Pet. 18-22) that their casino operations did not violate 18 U.S.C. 1955, which penalizes a large-scale gambling business that "is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. 1955(b)(1)(i). They assert that the state laws that their operations violated were "civil/regulatory," rather than "criminal/prohibitory," in nature, and as such were inapplicable to reservation Indians under the doctrine announced in *Cabazon* and *Bryan* v. *Itasca County*, *supra*.

This Court in *Cabazon* noted but did not resolve the question whether the distinction between "civil/regulatory" and "criminal/prohibitory" laws, which limits the direct application of state laws pursuant to Public Law 280, also serves to limit the application of 18 U.S.C. 1955, which is a federal statute (albeit one the violation of which is premised on a violation of state law). 480 U.S. at 213-214. The court below likewise did not resolve that question.[10] Instead, it concluded that petitioners' slot machine operations

[10] The district court expressed the view that the analysis in *United States* v. *Dakota*, 796 F.2d 186 (6th Cir. 1986), which held the regulatory/prohibitory analysis irrelevant to the application of 18 U.S.C. 1955, "appears to be more compelling" than that in the Ninth Circuit's decision in *Cabazon*, which reached a contrary conclusion. Pet. App. 22b. But the district court does not appear to have rendered a definitive ruling on the question. It assumed, *arguendo*, that the regulatory/prohibitory distinction applies under 18 U.S.C. 1955, but held that the New York law at issue was prohibitory in nature. Pet. App. 22b.

violated 18 U.S.C. 1955 even if the regulatory/prohibitory distinction applies, because "New York flatly prohibits the operation of slot machines for gambling purposes. *State* v. *Snyder*, 141 Misc. 2d 444, 449, 532 N.Y.S.2d 827, 831 (County Ct. 1988) ('such conduct . . . is not permitted to any extent in this State'); N.Y. Penal Law § 225.30 (McKinney 1989)." Pet. App. 18a. As "[t]here is surely a basis for [the court of appeals'] conclusion" that the New York law is criminal/prohibitory, this Court should be "reluctant to disagree with that court's view of the nature and intent of the state law at issue here." *Cabazon*, 480 U.S. at 210. In any event, that ruling below, which turns on a characterization of state law, does not warrant review by this Court.

5. Finally, petitioner Laughing argues (Pet. 23-24) that he was erroneously denied a reduction of sentence for acceptance of responsibility. The court below, however, reasonably concluded that petitioner's self-justifying remarks at sentencing provided an "adequate foundation" for the district court's action.

The applicable Sentencing Guideline specifically provides that "[a] defendant who enters a guilty plea is not entitled to a sentencing reduction under [§ 3E1.1] as a matter of right." United States Sentencing Guidelines § 3E1.1(c) (1990) (reproduced at Pet. App. 10d); see *United States* v. *Rios*, 893 F.2d 479, 481 (2d Cir. 1990); *United States* v. *Carroll*, 893 F.2d 1502, 1512 (6th Cir. 1990); *United States* v. *Royer*, 895 F.2d 28, 29-30 (1st Cir. 1990). Laughing entered his plea only on a conditional basis and only *after* the jury was sworn (C.A. App. 11a) and conviction was certain, and without a firm indication of remorse. See C.A. App. 785a-786a, 796a-802a; page 5, *supra*. Each of those factors has been held to be

a sufficient basis for declining to reduce the offense level. *United States* v. *Rios*, 893 F.2d at 481 (plea immediately before jury selection); *United States* v. *Carroll*, 893 F.2d at 1512 (certainty of conviction); *United States* v. *Royer*, 895 F.2d at 30 ("acceptance of responsibility necessitates * * * authentic remorse"); see also *United States* v. *Reyes*, 927 F.2d 48, 51 (1st Cir. 1991); *United States* v. *Whitehead*, 912 F.2d 448, 451 (10th Cir. 1990). In addition, the court in this case had before it, at the time of sentencing, petitioner Laughing's unconditional plea of guilty to forcibly resisting arrest, another factor that militated against a reduction for acceptance of responsibility. *United States* v. *Rocha*, 916 F.2d 219, 245 (5th Cir. 1990) (failure to surrender when on notice of investigation); *United States* v. *Casal*, 915 F.2d 1225, 1230 (8th Cir. 1990) (running away from investigating officers), cert. denied, 111 S. Ct. 1400 (1991); cf. *United States* v. *Castillo-Valencia*, 917 F.2d 494, 502 (11th Cir. 1990) (attempt to evade apprehension basis for obstruction increase, Guidelines § 3C1.1); *United States* v. *Irabor*, 894 F.2d 554, 556-557 (2d Cir. 1990) (false identification on arrest is obstruction meriting increase under Guidelines § 3C1.1, and obstruction warrants denial of reduction for acceptance of responsibility).

In short, there were ample grounds for the district court's decision not to reduce Laughing's sentence for operating a large-scale casino operation. That fact-bound issue does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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